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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>FREDDY LUNA,<br><br>Defendant and Appellant. | B253059<br><br>(Los Angeles County<br>Super. Ct. No. BA409799) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed as modified with directions.

Law Offices of Thor O. Emblem and Tracy L. Emblem, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan K. Kline, Shawn McGahey Webb and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

A jury convicted defendant, Freddy Luna, of methamphetamine possession in violation of Health and Safety Code section 11377, subdivision (a). The trial court found defendant had prior convictions within the meaning of Penal Code[1] sections 667, subdivisions (b) through (i), 667.5, subdivision (b) and 1170.12. Defendant was sentenced to nine years in state prison. We modify the judgment to include penalties and a surcharge on a fine. We affirm the judgment in all other respects.

## II. DISCUSSION

### A. Prior Prison Term Enhancements

Defendant asserts the trial court erred in imposing three one-year prior separate prison term enhancements under section 667.5, subdivision (b). Defendant argues he admitted only the fact of the prior convictions and not the remaining elements. Imposition of a section 667.5, subdivision (b) one-year prior separate prison term enhancement requires proof of: a prior felony conviction; resulting in imprisonment; completion of that prison term; and a failure to remain free of felony offense or custody for five years. (*People v. Tenner* (1993) 6 Cal.4th 559, 563; *In re Jones* (1994) 27 Cal.App.4th 1032, 1041; *People v. Elmore* (1990) 225 Cal.App.3d 953, 956-957.) Under the totality of the circumstances, including defendant's previous experience in the criminal justice system, defendant's admissions were sufficient. (*People v. Mosby* (2004) 33 Cal.4th 353, 356; *People v. Carrasco* (2012) 209 Cal.App.4th 715, 724-725.)

The totality of the circumstances in this case include: the information's express allegations; defendant's extensive experience with the criminal justice system;

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**1** Further statutory references are to the Penal Code unless otherwise noted.

defendant's representation by counsel at the court trial on the alleged prior convictions; and the trial court's specific references to the one-year enhancements. The information alleges defendant had "suffered" three prior convictions within the meaning of section 667.5, subdivision (b), and "that a term was served as described in . . . section 667.5 for said offense(s)." And the information also alleges, "[D]efendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term." The three prior prison terms were alleged to have been served in case Nos. BA224181 (2002), BA315050 (2007), and BA384290 (2012). Defendant was representing himself when he first appeared for trial. The trial court discussed with him his potential sentence. The trial court noted, "They have alleged three one-year priors." Defendant acknowledged the trial court's computation of his potential sentence. Defendant advised the trial court: "I have been doing this a long time. I have been pro per for the last 30." Defendant said he "always went pro per" from 1986 to 2013. Defendant admitted, "I have done a lot of time."

Consistent with his representations in the trial court, defendant had a long history of prior convictions including: unauthorized use of a vehicle in 1977; burglary in 1980; two theft convictions in 1983; petty theft in 1984; petty theft again in 1986; robbery in 1985; failure to appear in 1987; controlled substance transportation or sale in 1987; controlled substance possession in 1990; controlled substance transportation or sale in 1991; two separate convictions of narcotic, drug or alcohol possession in 1996; driving on private property without consent in 1997; controlled substance use in 1997; narcotic, drug or alcohol possession in 1998; public intoxication in 2000; controlled substance possession in 2000; controlled substance transportation or sale in 2002; controlled substance transportation or sale in 2007; controlled substance possession in 2012; controlled substance paraphernalia possession in 2013; and controlled substance possession in 2013.

Defendant waived his jury trial right and a court trial was held on the prior conviction allegations, including the prior prison terms. By this time, defendant was

represented by appointed counsel. At the outset of the proceeding, the trial court referenced the information. The trial court commented, "I think there is a strike prior and some one-year priors also." Defendant's appointed counsel, Arthur P. Lindars, responded, "Yes." Deputy District Attorney Joel Wilson described each prior conviction allegation, including the prior prison term enhancements. Mr. Wilson discussed the case numbers, the crimes committed and the conviction dates. Defendant then admitted that the nine prior conviction allegations were true. Defendant expressly admitted that one of those convictions was for a serious or violent felony within the meaning of sections 667, subdivisions (b) through (i) and 1170.12. The trial court noted, "Court accepts the admission of the prior conviction, the strike in case A765289, and I accept the three one-year priors pursuant to 667.5(b), and that is BA384290, BA315050, and BA224181." In light of all the foregoing circumstances, we conclude defendant voluntarily and intelligently admitted the section 667.5, subdivision (b) prior separate prison term allegations. The trial court did not err by imposing three one-year enhancements for the prior prison terms. (*People v. Mosby, supra,* 33 Cal.4th at p. 365; *People v. Carrasco, supra,* 209 Cal.App.4th at pp. 724-725.)

B. Defendant's Motion to Strike

The information alleged defendant had been convicted of a serious felony, robbery, in case No. A765289 and was thus subject to sentencing under sections 667, subdivisions (b) through (i) and 1170.12. The trial court denied defendant's section 1385, subdivision (a) (section 1385) motion to strike that prior serious felony conviction allegation. Defendant contends the trial court abused its discretion in so doing. We find no abuse of discretion.

When exercising its section 1385 authority with respect to a prior conviction allegation under sections 667, subdivisions (b) through (i), and 1170.12, a trial court may consider: the nature and circumstance of the defendant's present felonies and prior serious or violent felonies; his or her background, character, and prospects; whether the

defendant may be deemed outside the spirit of the sentencing scheme, in whole or in part; and therefore whether the accused should be treated as though he or she had not previously been convicted of one or more serious or violent felonies. (*People v. Wallace* (2004) 33 Cal.4th 738, 747-748; *People v. Williams* (1998) 17 Cal.4th 148, 160-161.) On review, we consider those same factors. (*In re Large* (2007) 41 Cal.4th 538, 552; *People v. Williams, supra*, 17 Cal.4th at p. 161.) We review the trial court's refusal to strike the prior conviction allegation for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374-376; *People v. Philpot* (2004) 122 Cal.App.4th 893, 904; see *In re Coley* (2012) 55 Cal.4th 524, 545.)

There was no abuse of discretion. As noted briefly above, defendant had a long history of felony convictions as well as several misdemeanors. On November 12, 1977, defendant was charged in Texas with unauthorized use of a vehicle. He was sentenced to five years' confinement. On October 17, 1980, defendant committed a burglary, also in Texas. He was sentenced to four years' confinement. On December 20, 1982 defendant committed a theft in Texas. On January 7, 1983, he was sentenced to 30 days' confinement. And on February 18, 1983, defendant committed another theft in Texas. On February 24, 1983, he received a sentence of 30 days' confinement.

Defendant then moved from Texas to California. Defendant committed his first California crime on November 13, 1984. Compton police officers arrested defendant for petty theft (§ 484, subd. (a)), a misdemeanor. (Case No. M346460.) Three days later, on November 16, 1984, defendant was placed on probation for one year. Inglewood police arrested defendant less than three months later, on February 2, 1985, for petty theft (§ 484, subd. (a)). (Case No. M205147.) On June 17, 1986, he was placed on probation for three years. Prior to his sentencing, however, on April 15, 1985, defendant had been arrested in Los Angeles for robbery (§ 211). (Case No. A765289.) On November 1, 1985, defendant was placed on four years' formal probation. Defendant committed a misdemeanor, failure to appear, on October 8, 1986. (Case No. 31371914.) On January 5, 1987, he was sentenced to five days in jail. Defendant's probation in his robbery case was revoked and reinstated on March 26, 1987. Four months later, on July 28, 1987,

defendant was arrested in Los Angeles for controlled substance transportation or sale (Health & Saf. Code, § 11352, subd. (a)). (Case No. A955837.) On November 24, 1987, he was placed on probation for three years. Probation in defendant's robbery case was revoked a second time and on January 29, 1988, he was sentenced to three years in prison. Also on January 29, 1988, probation in defendant's transportation or sale case was terminated. Defendant was sentenced to four years in prison.

On March 23, 1990, following defendant's release from prison, Los Angeles police officers arrested him for controlled substance possession or purchase for sale (Health & Saf. Code, § 11351). (Case No. BA015504.) On August 22, 1990, he was placed on formal probation for five years. On September 10, 1991, however, defendant was again arrested in Los Angeles. He was charged with controlled substance transportation or sale (Health & Saf. Code, § 11352, subd. (a)). (Case No. BA045259.) Probation in his possession or purchase for sale matter was revoked. On December 5, 1991, defendant was sentenced in both cases to four years in prison. On February 22, 1995, he was charged in two separate cases with unauthorized possession of a controlled substance in prison (§ 4573.6). (Case Nos. BA111962 and BA118818.) On February 1, 1996, he was sentenced to 32 months in prison in one case and 8 months in prison in the other.

Defendant continued his criminal lifestyle upon his release from prison. On April 11, 1997, he was arrested in Hollywood and charged with driving on private property without the owner's consent (§ 602, subd. (n)), a misdemeanor. (Case No. 7HL01194.) On April 14, 1997, he was sentenced to two years' probation. A week later, however, on April 23, 1997, defendant was again arrested in Hollywood. He was charged with being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), a misdemeanor. (Case No. 7HL01337.) On April 28, 1997, defendant was placed on probation for two years on the condition he serve 90 days in the county jail. Also on April 28, 1997, probation in defendant's first Hollywood misdemeanor case was revoked and reinstated on the condition that he serve 15 days in the county jail. On December 5, 1997, sheriff's deputies at an East Los Angeles jail arrested defendant for possession of a

controlled substance (§ 4573.6). (Case No. BA162263.) On May 13, 1998, defendant was placed on three years' formal probation. Later that year, however, on September 11, 1998, defendant's probation was revoked and he was sent to prison for three years.

Defendant was once again released from prison. On June 21, 2000, however, defendant was arrested in Hollywood for public intoxication (§ 647, subd. (f)), a misdemeanor. (Case No. OHL01417.) On September 18, 2000, he was placed on probation for two years. On December 27, 2000, defendant was charged with controlled substance possession in violation of Health and Safety Code section 11350, subdivision (a). (Case No. BA211610.) He was placed on five years' formal probation. His probation was revoked, however, following his November 5, 2001 arrest for controlled substance transportation or sale (Health & Saf. Code, § 11352, subd. (a)). (Case No. BA224181.) At trial in the present case, defendant testified his conviction in case No. BA224181 was for rock cocaine sale. On November 19, 2002, defendant was sentenced in both consolidated cases to five years in prison. On January 4, 2007, defendant was once again charged with controlled substance transportation or sale (Health & Saf. Code, § 11352, subd. (a)). (Case No. BA315050.) On June 14, 2007, he was sentenced to five years in prison. At trial in the present case, defendant admitted his conviction in case number BA315050 was for rock cocaine sale. On May 9, 2011, defendant was charged with controlled substance possession (Health & Saf. Code, § 11350, subd. (a)). (Case No. BA384290.) On January 17, 2012, he was sentenced to two years in prison. On January 15, 2013, defendant was charged with controlled substance paraphernalia possession (Health & Saf. Code, § 11364, subd. (a)), a misdemeanor. (Case No. BA406869.) On February 7, 2013, defendant was sentenced to 44 days in the county jail. On February 16, 2013, defendant was arrested for controlled substance possession (Health & Saf. Code, § 11350, subd. (a)). (Case No. BA408028.) We have no record of the disposition in that matter.

On April 4, 2013, defendant committed the present offense. Officer Jose Diaz testified he was conducting surveillance in an area known for drug trafficking. Officer Diaz saw defendant sell heroin to another person for cash. Defendant testified he was a

Vietnam veteran who had been living in the skid row area of downtown Los Angeles for at least 15 years. Defendant's birth date is December 25, 1965, which belies his claim he was a Vietnam veteran, at least during a period of armed conflict. Defendant was trying to help a young man obtain heroin from a drug dealer. Defendant identified the young man only as Mr. Gleason. Defendant denied he had sold any heroin. Defendant testified, "[Mr. Gleason] came and he hollered my name . . . and asked if I could take some time to assist him 'cause him and his girlfriend were sick off of heroin." Defendant decided to help them because they were White. Mr. Gleason and his girlfriend looked out of place in Skid Row because of their race. Defendant received a $20 bag of methamphetamine from Mr. Gleason. Mr. Gleason handed defendant $18 in cash when they were about a half a block from the location of the heroin connection. Defendant said he never had any heroin in his possession. Defendant denied giving any heroin to Mr. Gleason. With respect to his drug use, defendant testified: "[Rock cocaine has] been my drug of choice for 35 years. Just the last two years I replaced it with methamphetamine because it lasts longer and it's cheaper. It's a cheaper high and it lasts longer."

According to the probation officer's May 22, 2013 report, defendant was on post-release community supervision when he committed the present offense. But defendant had never reported to the probation department. As a result, an arrest warrant had been issued for his apprehension. His post-release community supervision had been due to expire on July 31, 2015. Defendant also had an outstanding traffic warrant. And he had a record of four out-of-state arrests with no disposition indicated. The probation officer concluded: "Defendant . . . has a substantial history of criminal activity. . . . Apparently, he continues to commit criminal conduct. Evidently, defendant . . . chose to participate in a scheme to sell a controlled substance. His unlawful and anti-social conduct contribute[s] to the deterioration of the community, and has no social redeeming value. There is no compelling reason to believe he will comply under supervision even if probation is granted. Moreover, the defendant is deemed unsuitable and ineligible for a

grant of probation at this point. [¶] If convicted of the present offense, a state prison commitment is recommended. This repeat offender's criminal conduct puts the health and safety of the community at risk. Therefore, a period of incarceration would serve both to protect the community from further criminal acts by defendant . . . , and as a reasonable punitive measure."

The trial court's decision not to strike defendant's prior conviction allegation under sections 667, subdivisions (b) through (i), and 1170.12, was well within the bounds of reason. Defendant made no case that his character, background or prospects set him outside the spirit of the sentencing scheme. As the trial court reasonably concluded, the repeated convictions and "great deals" defendant had gotten in the past had not deterred defendant from continuing to use illegal drugs and commit crimes. No abuse of discretion occurred.

C. Fines And Fees

The trial court orally imposed a $50 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)) and "a $20 DNA sample fee." We assume the trial court's reference to "a $20 DNA sample fee" is to the $20 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)) imposed on the criminal laboratory analysis fee. We asked the parties to brief the question whether the trial court erroneously failed to impose additional penalties and a surcharge applicable to the criminal laboratory analysis fee. The parties agree the criminal laboratory fee is also subject to: a $50 state penalty (§ 1464, subd. (a)(1)); a $35 county penalty (Gov. Code, § 76000, subd. (a)(1)); a $10 state surcharge (§ 1465.7, subd. (a)); a $25 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); a $5 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)); and a $10 emergency medical services

penalty (Gov. Code, § 76000.5, subd. (a)(1)). The judgment is modified to impose the foregoing penalties and surcharge. The abstract of judgment must be amended to so reflect.

The trial court orally imposed a $2,520 restitution fine (§ 1202.4, subd. (b)) and a $2,520 parole revocation restitution fine (§ 1202.45). Those fines are erroneously recorded in the abstract of judgment in the amount of $2,500 each. The oral pronouncement of judgment controls. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Mesa* (1975) 14 Cal.3d 466, 471.) The parties agree that the abstract of judgment must be amended to reflect the trial court's oral imposition of judgment.

## III. DISPOSITION

The judgment is modified to include, in connection with the $50 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)): a $50 state penalty (§ 1464, subd. (a)(1)); a $35 county penalty (Gov. Code, § 76000, subd. (a)(1)); a $10 state surcharge (§ 1465.7, subd. (a)); a $25 state court construction penalty (Gov. Code, § 70372, subd. (a)(1)); a $5 deoxyribonucleic acid penalty (Gov. Code, § 76104.6, subd. (a)(1)); a $20 state-only deoxyribonucleic acid penalty (Gov. Code, § 76104.7, subd. (a)) and a $10 emergency medical services penalty (Gov. Code, § 76000.5, subd. (a)(1)). The judgment is affirmed in all other respects. Upon remittitur issuance, the abstract of judgment must be amended to include the foregoing penalties and surcharge. The abstract of judgment must also be amended to reflect a $2,520 restitution fine (Pen. Code, § 1202.4, subd. (b)) and a $2,520 parole revocation restitution fine (Pen. Code, §

1202.45). The clerk of the superior court must deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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TURNER, P. J.

We concur:

MOSK, J.

MINK, J.*

*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.